

FILED
COURT OF APPEALS
DIVISION II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

2017 FEB 16 PM 1:09

STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

No. 48943-1-II

BY AP
DEPUTY

v.

PRO SE SUPPLEMENTAL BRIEF

JOSHUA D.C. RHOADES,
Appellant/Petitioner.

A. ASSIGNMENT OF ERROR

1. The trial court erred and abused its discretion by committing a violation when not following the statutes of RCW 10.10.160, placing the state in procedural default.

2. The trial court erred and abused its discretion by continuing to impose legal financial obligations (LFO's) upon an impoverished petitioner.

3. The trial court erred by "NOT" applying the "manifest hardship" standard of RCW 10.01.160(4).

B. STATEMENT OF THE CASE

Petitioner appeared in Lewis County Superior Court on May 3, 2016 so he could be resentenced on unrelated cause number 13-1-00076-2 (VRP Resentencing 5/3/2016).

PRO SE SUPPLEMENTAL BRIEF -1-

P/M: 2/14/17

Subsequent to that the trial court addressed pro se motions filed by petitioner on March 3, 2014 (CP 19-28, 55-64, 84-93) and on April 26, 2016 (CP 29-33, 65-69, 94-98) to modify and/or terminate his LFO's on cause numbers 99-1-00424-2, 00-1-00169-4, and 06-1-00613-0. Included with the motions filed on March 3, 2014 were affidavits revealing petitioner has four young children, owes Dynamic Collectors, and that he has "NO" money in his savings or checking (CP 26-28, 56-58, 85-87) (VRP 5/3/2016).

Petitioner argued to the trial court that he doesn't have the current or future ability to pay because he has four children to provide for, that he will be required under community custody to pay a minimum of \$25 on the ten separate cause numbers, totaling \$250 a month or be subject to incarceration for a "Failure to Pay" DOC violation and that there's also every day living cost. (VRP 5/3/2016 at 14). Petitioner also argued in both motions that trial courts imposition of LFO's place a burden upon the petitioner and his family and that the trial court failed to find he had the ability to pay.

The court denied his motions finding he has the "Future" ability to pay. (CP 36, 71, 100).

Petitioner returned to the Department of Corrections where he has timely filed and appeal, as well as submits this pro se Supplemental Brief.

C. ARGUMENT

1. The trial court erred and abused its discretion by committing a violation when not following the Statutes of RCW 10.01.160, placing the state in procedural default.

A trial courts failure to adhere to the strict procedures of the statutes that have been placed by the legislature violates the petitioners right of due process. Court's failure to follow what's been set out in RCW 10.01.160 by the legislation is abuse of discretion. A trial court abuses its discretion when it fails to exercise its discretion. State v. Stearman, 187 Wn.App. 257,265 P.3d 394 (2015).

The courts review issues of statutory construction de novo State v. Wentz, 149 Wn.2d 342,346, 68 P.3d (2003). The court looks to the statutes plain language in order to give effect to legislative intent, giving statutory terms their plain and ordinary meaning. Id.; In re det. of Rogers, 117 Wn.App 270,274 (2003). The court does not engage in judicial interpretation of an unambiguous statute. State v. Thorne, 129 Wn.2d 736,762 (1996). A statute is ambiguous when

language is susceptible to more than one reasonable interpretation. State v. Jacobs, 154 Wn.2d 596,600-01 (2005). When ever possible statutes "ARE" to be read in harmony and in such manner as to give each effect. State v. Bays, 90 Wn.App. 731,735 (1998). Statutes are interpreted to give effect to "ALL" language in them and to render no portion meaningless or superfluous. State v. J.P., 149 Wn.2d 444,450 (2003). "Where a provision contains both words 'shall' and 'may', it is presumed that the lawmakers intended to distinguished between then; 'shall' being construed as mandatory and 'may' as permissive or discretionary." Rogers, 117 Wn.App at 274-75. The statute is plain in its meaning and the courts must now comply to the "legislature intent by law." Jacobs, 154 Wn.2d 596, 600 (2005).

Here petitioner was assigned counsel at trial stages of these cause numbers 99-1-00424-2, 00-1-00169-4, and 06-1-00613-0 and is still at the time of this pro se supplemental brief being found indigent with no forseable change in the future which clearly proves the courts have been and are abusing their discretion by making "boilerplate" decisions in regards to LFO's.

Trial court committed error when at original sentencing they failed to follow procedures as designated in RCW 10.01.160 by not conducting any inquiry as to the current or future ability to pay any LFO's imposed by the court in the cause numbers stated above.

Trial courts failure to adhere to following legislative intent by law. The trial court should have conducted the strict procedures handed down by legislature..

Failure to adhere to legislative intent does cause procedural error, thus trial court abused its discretion, thus creating a due process violation.

Petitioner addressed these issues to the trial court in the form of a motion to terminate/remit LFO's but abuse of discretion was again conducted when trial court denied petitioners motions but tried to correct procedurally flawed application of law by original trial court with failed attempt at finding the petitioner has the future ability to pay.

In a sense the trial court's attempting to get a second bite at the apple by making the ruling of a future ability to pay that the original trial court was supposed to conduct.

2. The trial court exceeded its statutory authority and abused its discretion by continuing to impose discretionary LFO's upon and IMPOVERISHED petitioner who's been deemed indigent by Lewis County Courts since his juvenile years.

In State v. Blazina, 182 Wn.2d 835-37, our Supreme court extensively reviewed the various problems associated with LFO's that offenders face, including inequities between "Impoverished" offenders and their wealthier counterparts causing offenders who cannot afford to pay to remain under the courts jurisdiction longer; the courts long term involvement in offenders lives inhibits REENTRY INTO SOCIETY [emphasis added] because legal or background checks will show an active record in court for individuals who have been unable to fully pay their LFO's; active court records negatively impact employment, credit ratings, housing and finances; and disparate impact on minorities who receive disproportionately higher LFO penalties.

Trial courts 'may' order payment of LFO's as part of a sentence. RCW 9.94.760. However, RCW 10.01.160(3) forbids imposing LFO's unless "the defendant is or will be able to pay them." In determining LFO's, courts "shall take account of the burden that payment of cost will impose" RCW 10.01.160(3). The trial courts continued imposition of the mandatory LFO's in the petitioners motions are not at issue. But the remaining discretionary LFO's identified in respondent's brief filed January 12, 2017 should not be imposed.

RCW 10.01.160(3) provides:

The court "shall" not order a defendant to pay cost unless the defendant is or will be able to pay them. In determining the amount and method of payment of cost, the court "shall" take account of the financial resources of the defendant and the nature of the burden that payment of cost will impose.

This statute is mandatory; "It creates a duty rather than confers discretion." *State v. Blazina*, 182 Wn.2d 827 (2015); citing *State v. Bartholomew*, 104 Wn.2d 844, 848 (1985).

"Practically speaking... the trial court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record "must reflect that the trial court made an individualized inquiry into the defendants current and future ability to pay." *Id.* (emphasis added) "Within this inquiry the court must also consider important factors ... such as incarceration and defendant's "other debts"... when determining a defendant's ability to pay." *Id.* (emphasis added).

The courts efforts under Blazina are RCW 10.01.160 fell way to short of what our supreme court established when ruling on Blazina. Despite knowing the petitioner has four children to support and ten superior court cause numbers which result in significantly high monthly LFO payments that are required to be paid every month or petitioner will be subject to incarceration for "failure to pay." The court did not elicit any precise information regarding these financial obligations. The trial court failed to take into account petitioners financial resources, such as his other debts and the burden of incarceration. See Blazina, 182 Wn.2d at 838.

The trial court also failed to follow Blazina's instruction to look to GR 34 for guidance. Blazina at 838-39. GR 34 specifies that persons who receive "assistance under a needs-based, means-tested assistance program" ... "shall be determined to be indigent." GR 34(a)(3)(A)(iii). Moreover, a person whose income is at or below 125% of the federal poverty level also "shall be determined to be indigent." GR 34(B). The trial court failed to inquire about any of this. Had they engaged in a GR 34 inquiry and "seriously questioned" petitioners ability to pay as Blazina instructed the trial court would not have continued to impose discretionary LFO's. The trial court failed to comply with RCW 10.01.160 and Blazina, and abused its discretion by not exercising its discretion. State v. Stearman 187 Wn.App 157,265 P.3d 394 (2015).

3. The trial court failed to take into account the financial resources of the petitioner and the burden payment of cost would impose on him and his family. The trial court should have applied the "Manifest Hardship" standard of RCW 10.01.160(4).

For purposes of RCW 10.01.160(4) which establishes a "manifest hardship" standard for ruling on a petitioners motion to terminate/remit cost, a "manifest hardship" includes an inability to meet basic needs. GR 34's basic living cost means the average monthly amount defendants will spend on reasonable payments towards living cost such as shelter, food, utilities, healthcare, transportation, clothing, loan payments, support payments, and court imposed obligations RCW 10.01.160(2)(d). A petitioners inability to meet basic needs is not only relevant but crucial in determining whether requiring the petitioner to pay LFO's would create a "manifest hardship."

When a defendant petitions the trial court for termination/remission of LFO's on the grounds of indigency and inability to pay. The court must apply the "manifest hardship" standard of RCW 10.01.160(4). The courts failure to do so before denying a motion to terminate/remit is reversible error. City of Richland v. Wakefield, 186 Wn.2d 596(2016).

Petitioner has four children to provide for and owes Dynamic Collectors as shown in the affidavit filed with the court (CP 25,57,86), that he has to pay a minimum of \$25 on ten separate cause numbers totaling \$250 a month or be subject to incarceration for a DOC "failure to pay" violation, and he also has everyday basic living cost. Petitioner clearly established that a "manifest hardship" would occur by continuing to impose discretionary LFO's. The trial courts failure to apply the "manifest hardship" standard of RCW 10.01.160(4) is forcing the petitioner to choose between putting food in his childrens mouth and a roof over their heads or going to jail for not being able to afford to pay his LFO's and provide for his children at the same time. This neither promotes respect for the law, nor provides punishment, which is just. Rather it fosters resentment and a sense of hopelessness that cannot be said to encourage a productive re-entry into society.

In the three cause numbers at hand it's evident from the payment history, or lack thereof and the amount of time that has past since LFO's were originally imposed that the petitioners ability to pay should seriously be questioned.

Under RCW 10.01.160(4) when an individual files a motion seeking termination/remission, the appropriate inquiry is whether the LFO's have resulted in a "manifest hardship" to the petitioner or his family. When applying the "manifest hardship" test, the trial court must look to the petitioners current financial circumstances. *State v. Blank*, 131 Wn.2d 230,290 (1997). *Blank* held that RCW 10.73.160(4), which is nearly identical to RCW 10.01.160(4), requires the court to apply the "manifest hardship" test to petitioners financial circumstances at the time he makes the motion to remit appellate cost. As detailed in *Fuller* and its progeny, "the obligation to repay the state accrues only to those who later acquire the means to do so without hardship." *Fuller*, 417 U.S. at 46, *State v. Barklin*, 87 Wn.2d 814, 817 (1997). In other words, "those who remain indigent or for whom repayment would create "manifest hardship" are forever exempt from any obligations to repay." *Fuller*, 417 U.S. at 53.

Here the petitioner is not in contempt of court, his inability to pay due to indigence is not willful contempt. *Bearden v. Georgia*, 461 U.S. 660 (1983).

Given the above arguments, the trial court abused its discretion in denying the petitioners motions for relief from LFO's because the decision was based on untenable grounds.

4. Appeal cost should not be imposed.

The trial court found the petitioner to be indigent and entitled to appointment of counsel at public expense. Moreover, petitioner, is appealing denials of motions to terminate/remit discretionary LFO's because of his continued indigency, inability to pay, and the "manifest hardship" under RCW 10.01.160(4) that its caused. His prospects of being able to afford appellate cost are minute. Therefore, if he does not prevail on appeal, he requests that no cost of appeal be authorized under title 14 RAP. See *State v. Sinclair*, 192 Wn.App. 380, 389-90 (2016) (Instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the "court of appeals ... may require and adult ... to pay appellate cost." (emphasis added). The word "may" has permissive or discretionary meaning. *State v. Brown*, 139 Wn.2d 757,789 (2000). Thus this court has ample discretion to deny the state's request for cost.

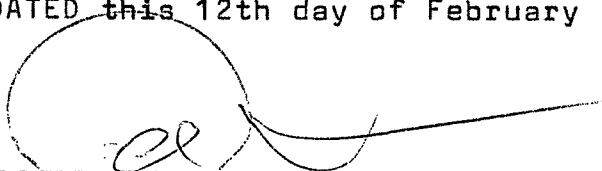
As discussed in appellant's opening brief and this pro se supplemental brief, trial courts must make individualized findings of current and future ability to pay before they impose LFO's. *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts " arrive at an LFO order appropriate to the individual defendants circumstances." *Id.*

Accordingly, petitioner's ability to pay must be determined before discretionary costs are imposed. Without basis to determine that petitioner has a present or future ability to pay, this court should not assess discretionary appellate cost against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

Petitioner was prejudiced by the trial courts failure to assert, comply, and adhere to strict court rule procedures to apply correct and lawful application of well established supreme court case law, legislative intent by law, and federal constitutional provisions that do in fact violate due process to fair and impartial fact finding of applicability applying correct facts, findings, and conclusions of law. For the facts stated above petitioner should be granted relief from all discretionary LFO's on all three cause numbers.

DATED ~~this~~ 12th day of February 2017.



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SEAN M. DOWNS
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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Cause No. 48943-1-II

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Division II

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Dated at Clallam Bay, Washington on 2-13-2017
(City & State.) (Date)

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Joshua Rhoades, Pro Se

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